STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B167

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LYNN SHORT and KATHY LAKE,

Complainants,

vs.

DEPARTMENT OF REVENUE, MOTOR VEHICLE DIVISION,

Respondent.

The hearing in this matter commenced on July 31, 1996, and, following a well-grounded continuance, was held on April 17, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by assistant attorney general Mark Gerganoff. Complainants appeared in person and were represented by Phyllis Ain and D. Laird Blue, attorneys at law.

Respondent called the following witnesses: Gloria Breeden, Administrative Assistant III; Susan Bishop, Program Administrator; and John Duncan, Deputy Director, Motor Vehicle Division of the Department of Revenue.

Complainants testified in their own behalf and called Jody Reid, former Field Operations Manager.

Respondent's Exhibits 1 through 4 and Complainants Exhibits A, B, C, D and F were admitted into evidence by stipulation of the parties.

MATTER APPEALED

Complainant Lynn Short appeals a one month disciplinary demotion. Complainant Kathy Lake appeals a three day disciplinary suspension. For the reasons set forth below, both disciplinary actions are reversed.

ISSUES

- 1. Whether complainants committed the acts for which discipline was imposed;
- 2. Whether respondent's actions were arbitrary, capricious or contrary to rule or law;
- 3. Whether complainants were treated differently from similarly

situated employees;

4. Whether any party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

- 1. Complainants Lynn Short and Kathy Lake have been employed by respondent Department of Revenue, Motor Vehicle Division (MVD), for approximately 20 years. Short is an administrative program specialist. Lake is an accounting technician. Both have excellent employment histories and have received no prior disciplinary or corrective actions. Short was Lake's supervisor at the time of the subject incident.
- 2. In anticipation of a planned move of the MVD office from 140 West Sixth Avenue, Denver, to 1881 Pierce Street, Lakewood, Short and Lake went to look at the Pierce street building in early March 1996. The building was being renovated. Short noticed that the windows were very large and were not covered.
- 3. The move from the Denver office to the Lakewood facility took place during the first week of April 1996. Professional movers had been contracted, but many employees packed and moved their own computers and personal items. Some employees helped move furniture and equipment.
- 4. On April 3, 1996, Short and Lake packed certain items that they intended to move by themselves, such as their computers, files and miscellaneous items. Around noon, Short's husband, Mark Short, stopped by for lunch. Mr. Short asked if they were going to take the window blinds. At that point, Lynn Short decided to take the blinds for use at the new building. Mr. Short stood on a conference table and removed them.
- 5. The blinds were vertical blinds approximately ten feet in length, which were custom-made for the Sixth Avenue building in 1992. The cost, including installation, was approximately \$863.00. The 1996 value is not known.
- 6. Short and Lake loaded the blinds into Short's Bronco II and Lake's van to be taken to the Pierce Street building. They were given administrative leave on April 4 because their new offices were not ready for occupancy.
- 7. On April 5, 1996, Short and Lake went to their new offices and discovered that window blinds were in place. The offices still were not ready, so they left everything in their vehicles.
- 8. Short and Lake approached Don Burton, Driver's License

Administrator and Short's supervisor. Short was upset that she had brought blinds that could not be used at the new office, and she asked Burton what to do. Burton said to just throw them away. He did not specify a particular procedure for doing so.

- 9. The blinds had not yet been unloaded from the vehicles, so Short and Lake each took some of them home to be disposed of. Neither one had any intent to use the blinds for their own purposes.
- 10. Gloria Breeden, an accounting technician, heard that Short had taken the blinds from the Sixth Avenue building. She informed Program Administrator Susan Bishop by saying that she was bothered by the fact that the blinds had been taken and she wanted to know how to report it. Bishop then reported the taking to her supervisor, MVD Director Dee Hartman.
- 11. Hartman contacted John Duncan, Deputy Director (now Chief of Staff), and told Duncan that an employee had informed him that Short might be removing state property for her own use. He told Duncan to talk to Short and gain more information.
- 12. On April 10, 1996, Duncan telephoned Short for an informal discussion of the incident. This was the first time anyone had talked to Short about it. She told Duncan that she had the blinds at home in her garage and that Kathy Lake also had some. Duncan advised Short to take the blinds back to the Sixth Avenue building where they would be valued as salvage. Duncan next wrote a memo to Hartman confirming that Short and Lake had taken the blinds and were storing them at their respective homes. Short telephoned Lake to tell her that the blinds had to be taken back to Sixth Avenue.
- 13. The next day, April 11, Short and Lake took the blinds to the new office and informed Don Burton that they had them. Someone suggested that the blinds be loaded into another employee's van, but they all would not fit. All of the blinds were placed into Lake's van and transported to the old office by Burton, Lake and another employee.
- 14. Employees of other state agencies had been invited to the Sixth Avenue building to take items of use in their offices. MVD employees were given the same opportunity.

¹Duncan testified that he telephoned Short on April 17. However, the weight of the evidence and reasonable inferences lead to a finding that the call was made on April 10.

- 15. Duncan conducted separate R8-3-3 meetings for Short and Lake pursuant to a written notice which stated the reasons for the meeting as follows:
- 1. Possible unauthorized removal of state property from a state building.
- 2. Possible violations of the Driver License Section Security and Awareness Agreement.
- 3. Possible violation of State Personnel Board Rule 8-1-5 State assets Not to be Put to Private Use. (Enclosed)
- 4. Possible willful misconduct in violation of State Personnel Board Rule 8-3-3(C)(2). (Enclosed)

(Complainant's Exhibits A and B.)

- 16. The R8-3-3 meetings were held on May 2, 1996. With respect to Short, Duncan felt that because of the position she held she was familiar with the proper procedures for disposing of state property. (Short denied such knowledge.) He took into consideration that Short had allowed her husband to take down the blinds by standing on a table. Because Mark Short was a former state employee under a PERA disability retirement, resulting from a back injury, Duncan was concerned about the potential liability faced by the state if Mr. Short had fallen off the table and injured himself.
- 17. With respect to both Short and Lake, Duncan concluded that they exercised bad judgment in taking the blinds home to be thrown away. He did not believe that they were orchestrating a theft. If they had not taken the blinds to their residences, but rather had put them in the dumpster located outside the Pierce Street building, there would have been no need for discipline. Duncan was also concerned that the incident had become very visible to the other employees.
- 18. No one told Short and Lake that there was a dumpster located at the Pierce Street building. They never saw a dumpster there. Jody Reid, who was a field operations manager and participated in the move, never saw a dumpster around Pierce Street. Duncan is the only witness to whom the existence of such a dumpster was obvious.
- 19. Duncan decided that disciplinary action was appropriate because of the policy issue involved, i.e., the proper disposition of state property, and his obligation to protect the integrity of the system. Additionally, he felt that the incident had had an adverse effect on other employees. He wanted to make the point that if you are caught taking things, you do not get a chance to bring them back.

- 20. By letter dated May 14, 1996, Duncan demoted Short to grade 88, step 4, for a period of one month for exercising poor judgment in removing the subject window blinds and storing them at her home. This demotion represented a salary loss to Short in excess of \$500. Duncan also found it aggravating that Short had allowed her husband to take the blinds down because this exposed the state to unnessary risk. (Respondent's Exhibit 1.)
- 21. By letter dated May 14, 1996, Duncan suspended Lake for three days without pay for exercising poor judgment in removing the blinds and storing them at her home. (Respondent's Exhibit 2.) This represented a salary loss to Lake of approximately \$350. Duncan felt that a three day suspension was appropriate because it would serve the purpose of notice that state property needs to be treated carefully, and it would gain the confidence of other employees who had heard about the incident. Because the situation was obvious to other employees, he felt he had to do something.
- 22. Duncan suspended Lake and demoted Short because Short, unlike Lake, was an exempt employee under the FLSA, and could not be suspended without pay. Duncan felt that both employees were given adequate notice of the wrongfulness of their acts by virtue of their employment.
- 23. Complainants filed a joint appeal of the disciplinary actions.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on respondent in a disciplinary proceeding to prove by preponderant evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); section 24-4-105(7), C.R.S. (1988 Rep. Vol. 10A). The Board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously, or in violation of rule or law. Section 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B).

It is found that the testimony of both complainants was internally and externally consistent. They testified in a straightforward and forthright manner. They both are long-term employees with excellent employment records. Their testimony is accorded substantial weight.

Board Rule R8-3-1(B), 4 Code Colo. Reg. 801-1, provides that unless the conduct is so serious or flagrant that immediate disciplinary action is appropriate, a corrective action shall be

imposed before resorting to disciplinary action. In this case, the conduct cannot be considered flagrant or serious within the Rule. The policy complainants are alleged to have violated is too vague to conclude that a reasonable person would have been aware that complainants' actions were a violation of that policy. See, Toothaker v. Department of Corrections, Case No. 97B057 (Thompson, Initial Decision April, 1997); Wilder v. Board of Education of Jefferson County School District R-1, Case No. 96CA0709, 26 Colo. Lawyer at 182 (1997).

The evidence presented at hearing was that complainants would not have been disciplined if they had disposed of the blinds in a dumpster rather than taking them home for disposal. However, complainants credibly testified that they were not aware of a dumpster at the Pierce Street building. While a dumpster may have existed, it was not so obvious as to become the clear choice for disposing of the blinds.

Moreover, no harm was done by complainants' actions. The blinds were returned to the original building, where they were included in whatever salvage value the building contents turned out to have. Once given specific instructions on what to do with the blinds, complainants complied.

In addition, it was improper for the appointing authority to consider the acts of Short's husband in imposing the disciplinary actions. This was not one of the reasons listed in the letter informing complainants of the R8-3-3 meetings. If it was thought that this was significant enough by itself to possibly justify disciplinary action, it should have been part of a separate R8-3-3 process. However, looking at it by itself, Short allowing her husband to stand on a conference room table is not so flagrant or serious and would have merited no more than a corrective action.

The evidence strongly suggests that other employees were under the impression that complainants had taken the blinds for their own use. Duncan knew this wasn't true, yet he disciplined the complainants as if it were true in order to accommodate the perceptions of others. A more reasonable approach would have been to issue a memorandum stating his conclusion that the complainants had no intent to steal and did not steal. He also could have explained the consequences of appropriating state property for one's personal use, thereby accounting for the visibility of this incident without using these complainants as examples based upon the false impressions of others.

There is no credible evidence to substantiate the appointing authority's belief that complainants knew they were committing a wrongful act. Clearly they had no personal use for the blinds and would not have chosen to dispose of them at their respective residences if a more specific means of disposal had been brought to their attention. The evidence is convincing that Don Burton,

supervisor in authority to both Short and Lake, and from whom they sought guidance, instructed them to throw the blinds away without regard for the method of disposal.

Overall, there was a lack of evidence to show that complainants knowingly engaged in improper activities. Complainants were directed to attend an R8-3-3 meeting based on four reasons for possible disciplinary action. None of the four reasons were upheld. Complainants were disciplined for showing poor judgement, which was not one of the listed reasons for the R8-3-3 meeting. There was no proof that complainants knew their actions were wrong. It is improper to discipline employees because there is a perception that they did something wrong when the credible evidence clearly established that they had no intent to convert state assets to their own use. At the most, complainants' actions, which resulted in no harm to the employer, might have warranted a corrective action.

Complainants did not present persuasive evidence of similarly situated employees having been treated differently.

The evidence cannot substantiate any of the four charges against complainants. R8-3-1, concerning the imposition of a corrective action prior to discipline, was violated. Respondent's actions were consequently groundless and frivolous, entitling complainants to an award of their reasonable attorney fees and costs.

CONCLUSIONS OF LAW

- 1. Complainants did not commit the acts for which discipline was imposed.
- 2. Respondent's actions were arbitrary, capricious and contrary to rule or law.
- 3. Complainants were not treated differently from similarly situated employees.
- 4. Complainants are entitled to an award of their attorney fees and costs.

ORDER

The disciplinary actions are reversed. Lynn Short is reinstated to her original grade and step during the period of her demotion with back pay and benefits. Kathy Lake is reinstated to her position during the period of her suspension with back pay and benefits.

Respondent shall pay to complainants their reasonable costs and attorney fees incurred in pursuing this litigation.

DATED this ___day of July, 1997, at Denver, Colorado.

Robert W. Thompson, Jr. Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of July, 1997, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

D. Laird Blue Attorney and Counselor at Law 1675 Broadway, Suite 2100 Denver, CO 80202

Phyllis Ain Durham & Baron, P.C. 950 Seventeenth St., Suite 1750 Denver, CO 80202

and in the interagency mail, addressed as follows:

Mark Gerganoff Department of Law 1525 Sherman St., 5th Floor Denver, CO 80203